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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-400

LEON JONES, et al.,
Petitioners,

VS.

PACIFIC INTERMOUNTAIN EXPRESS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF FOR PACIFIC INTERMOUNTAIN EXPRESS
IN OPPOSITION**

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November 8, 1976.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App.¹ 4a-11a) is reported at 536 F.2d 817 (9th Cir. 1976). The order of the district court (Pet. App. 1a-3a) is

¹"Pet. App." refers to the appendix bound with the petition; "Pet." references are to the petition for a writ of certiorari; "R." references are to the record in the court below.

reported at _____ F.Supp. _____, 10 FEP Cases 913 (1975).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 30, 1976. A petition for rehearing was denied on June 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the circuit court abused its discretion in affirming the district court's denial of plaintiffs' motion for a preliminary injunction, where granting the injunction would require respondent Pacific Inter-mountain Express (hereinafter referred to as "PIE" or "the company") to reinstate certain minority driver employees who were laid off in accordance with the provisions of a "last hired, first fired" contractual seniority system which, it is alleged, perpetuates hiring discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e, *et seq.*) and the Civil Rights Act of 1866 (42 U.S.C. §1981).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e, *et seq.*) and the Civil Rights Act of 1866 (42 U.S.C. §1981).

STATEMENT OF THE CASE

A. The Decisions Below:

On December 20, 1973, petitioners filed a complaint in the U. S. District Court for the Northern District of California alleging that respondents, including PIE, had discriminated and continued to discriminate against petitioners on the basis of race in violation of the Civil Rights Acts of 1964 and 1866² (R. 198). Immediately thereafter petitioners sought a temporary restraining order, which was denied by the district judge.

Petitioners did not seek further interim relief until more than one year later, when they filed a motion for a preliminary injunction on January 24, 1975 (R. 1-5). The court denied the motion on April 1, finding that the "last hired, first fired" seniority system which PIE utilized pursuant to its collective bargaining agreement with the Teamsters Union did not violate the Civil Rights Acts (R. 193).

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. The court affirmed the order of the district court, and on June 21, 1976 denied a petition for rehearing (Pet. App. 4a-9a, 12a, 13a). The instant petition was filed on September 17, 1976.

²The complaint contains class action allegations, but as of this date petitioners have not moved for class certification.

B. The Employment Seniority System:

In accordance with its collective bargaining agreement, PIE maintains a chronological list of all regular drivers at each terminal, based on hiring dates. When the work force is reduced, employees are laid off in ascending order from the bottom of the list (R. 35). Employees retain recall rights for three years, and are rehired in inverse order of layoff (R. 36). The company must recall employees on lay-off before hiring new employees.

PIE and the Teamsters Union have utilized this seniority system since the 1940's (R. 92). When this suit was filed, there were 96 employees on the seniority list at PIE's Emeryville, California terminal who were subject to the company's collective bargaining agreement with Teamsters Local 468. Twenty had been laid off due to lack of work (R. 92).

C. Reorganization of PIE:

In 1969 PIE began building several new terminals so that it could switch from the inefficient use of pairs of drivers for long over-the-road trips to a relay system utilizing single drivers for divisional runs of moderate distances (R. 168, 177). As a result, drivers from Los Angeles, Emeryville and Chicago were transferred to new facilities in places such as Albuquerque, New Mexico (R. 168). Those drivers who refused to redomicile were laid off according to the seniority list. During the period of reorganization, from 1969 to 1972, PIE had reemployment commitments to a substantial number of drivers who had refused to relocate (R. 177, 187). At some

locations, such as the Albuquerque terminal, new drivers were not hired until 1972.

D. Persons Alleging Discrimination:

Seven black persons submitted affidavits or declarations in support of the motion for preliminary injunction. Mr. Leon Jones was hired by the company when he first applied in 1968 (R. 31), Mr. George Turk was hired in 1973, the first time he applied after 1965, the effective date of Title VII (R. 38), and Messrs. Clellan Moore, Robert Lattimore and Charles Phillips were hired in 1972, 1974 and 1974, respectively, after PIE had met its reemployment commitments to drivers laid off during the reorganization of the company (R. 172, 174). All five were placed in appropriate positions on the seniority list immediately after they were hired. They were subsequently laid off in November and December, 1974, along with fifteen white drivers, in accordance with the seniority system (R. 92). Mr. Gene Gathright was still working for PIE when the motion for a preliminary injunction was filed (R. 47). Mr. Richard Stinson had rejected two offers of employment and had never been employed by PIE (R. 69, 171).

ARGUMENT

It is well established that the power of the Supreme Court to issue a writ of certiorari is discretionary and should be exercised only under special circumstances. *Durham v. United States*, 401 U.S.

481, 483 (1971).³ When petitioners seek review of a non-final judgment on certiorari, such as in this case, the scope of review is even more restricted. The Court has not granted certiorari to review interlocutory orders, such as one denying a preliminary injunction, in the absence of an exceptional reason. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1915); *American Construction Co. v. Jacksonville, Tampa and Key West Railway Co.*, 148 U.S. 372, 384 (1897).

The Court stated in *American Construction Co.*:

"... [m]any orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this Court should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." 148 U.S. at 384.

In addition, the Court later held in *Hamilton-Brown Shoe Co.*:

"The decree sought to be reviewed [on certiorari] ... was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application." 240 U.S. at 258.

³Accord, *State v. Swift & Co.*, 260 U.S. 146, 151 (1922); *City and County of Denver v. New York Trust Co.*, 299 U.S. 123, 133 (1913); *Hyde v. Shine*, 199 U.S. 62, 85 (1905). The Court also has held that however important an issue may be to the petitioner, certiorari will be denied if the question raised is not of sufficient gravity and general importance, or if there is no conflict between the decisions of federal and state courts, between circuit courts or with prior decisions of this Court. *Fields v. United States*, 205 U.S. 293 (1907); *Forsyth v. Hammond*, 166 U.S. 506, 514 (1897); *Lau Ow Bew v. United States*, 144 U.S. 47 (1892).

We show below that the petition for a writ of certiorari here fails to establish extraordinary circumstances requiring review of an interlocutory order.⁴

I

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

To obtain review of an interlocutory order petitioners must show that there is a significant question of federal law or conflict with another appellate court, and that there are extraordinary circumstances which require that the petition be granted. The instant petition does not advance any compelling reason or authority to support the grant of certiorari at this stage of the proceedings.

We have found only three cases in which the Court has granted certiorari to review a lower court's disposition of a motion for a preliminary injunction due to the existence of an important question on the merits.⁵ However, none of the unique reasons which

⁴For example, the record does not explain the failure of plaintiffs to move for a preliminary injunction until nearly fourteen months after the filing of the complaint.

⁵A writ of certiorari was granted in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1951), to review a district court's grant of a preliminary injunction which restrained the Secretary of Commerce from enforcing an executive order of President Truman directing the seizure and operation of privately owned steel plants. The Court granted certiorari in *United States v. Republic Steel Corp.*, 362 U.S. 483 (1960), a case in which a court of appeals reversed a district court which had enjoined defendants from discharging industrial waste into a river, in violation of the Rivers and Harbors Act, 33 U.S.C. §403. In *United States v. First Nat'l City Bank*, 379 U.S. 378 (1965), the Court granted certiorari to review a circuit court's reversal of an injunction granted by a district court to prevent the bank from transferring property to a foreign corporation which allegedly owed income tax to the Internal Revenue Service.

accounted for the Court's grant of certiorari in those cases exists here; there is no potential national emergency, danger of irreparable ecological harm, or possibility that money owed to the U.S. Government will be transferred beyond the jurisdiction of the courts of the United States.

Further, in those cases the actions were brought to protect public interests, as opposed to the private interests involved in this case. As the Court stated in *United States v. First National City Bank*, note 5, *supra*, "Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." 379 U.S. at 383. Accordingly, the Court has declined to grant certiorari where the issue involved was a matter of private interest and there had been no final judgment in the lower court. *Chicago & Northwestern Railway Co. v. Osborne*, 146 U.S. 354 (1892).

Consistent with this long practice, the Court traditionally has denied petitions for writs of certiorari to review decisions of courts of appeals in suits brought to obtain injunctive relief. In two of such cases, petitioners alleged discrimination against them on the basis of race, in violation of the Fourteenth Amendment to the United States Constitution.⁶

⁶*Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968); *Bd. of Education v. Taylor*, 294 F.2d 36 (2d Cir. 1961), *cert. denied*, 368 U.S. 940 (1961). See, *Emery Airfreight Corp. v. Local Union 295*, 449 F.2d 586 (2d Cir. 1971); *cert. denied*, 405 U.S. 1056 (1972) (district court enjoined union from striking; court of appeals reversed); *Rutherford v. American Medical Ass'n*, 379 F.2d 641

In sum, petitioners have failed to raise a federal question which even approaches in significance those presented in cases in which certiorari has been granted to review an interlocutory order. No reason has been presented for the Court to depart from its general policy of denying certiorari on interlocutory orders lacking a significant federal question and a compelling public interest.

II

THE DECISION BELOW IS CORRECT

The decision below was the only one possible for the court to make on the record before it. Thus, the court of appeals found that petitioners had not established a key element of their case, a strong likelihood of success on the merits, "primarily because the necessary evidence is not in the record before us—just as it was not before the district judge when he denied the motion [for a preliminary injunction]" (Pet. App. 8a-9a).

An examination of the affidavits and declarations filed in support of the motion for preliminary injunc-

(7th Cir. 1957), *cert. denied*, 389 U.S. 1043 (1968), *reh. denied* 390 U.S. 975 (1968) (district court dismissed action to enjoin Food and Drug Administration and American Medical Association from interfering with the distribution of a drug; court of appeals affirmed); *Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 325 F.2d 822 (2d Cir. 1963), *cert. denied*, 376 U.S. 944 (1964) (district court dismissed action to enjoin patent infringement; court of appeals reversed); *Wolf Brothers & Co. v. Hamilton-Brown Shoe Co.*, 165 F. 413 (8th Cir. 1909), *cert. denied*, 214 U.S. 514 (1909) (circuit court dismissed action to enjoin trademark infringement; court of appeals reversed).

tion reveals the "necessary evidence" which petitioners failed to adduce in their attempt to secure interim relief. Petitioners submitted statistical evidence in an attempt to support a *prima facie* case of discrimination, but the figures upon which they relied were incomplete and inconclusive. For example, the statistics submitted to the district court did not show how many drivers PIE had hired in recent years, and the percentage of minorities among that group. Instead, petitioners relied on the number of drivers employed at the time of the application for a temporary restraining order. Petitioners submitted to the court population figures for the State of California, partially broken down by county, but omitted any proof of the relevant geographical hiring area for drivers at any of PIE's terminals, and failed to demonstrate the relevance of population figures as opposed to civilian labor force statistics.

Accordingly, there was no evidence before the district court from which it could have concluded that petitioners had demonstrated a strong likelihood of proving discrimination by PIE. Moreover, even if petitioners had shown a discrepancy between the percentage of black employees hired in a given time period and the proportion of qualified black drivers in the relevant hiring area, that alone would not have necessarily established a *prima facie* case. In recent decisions courts have found such evidence standing alone is not conclusive proof of discrimination. See *Louis v. Pa. Development Authority*, 371 F.Supp. 877 (1974); *Harper v. Mayor & City Council*, ____ F.Supp.

_____, 5 FEP Cases 1050 (1973); *Afro American Patrolmen's League v. Duck*, 366 F.Supp. 1095 (1973). Cf. *Pettway v. American Cast Iron Pipe Co.*, ____ F.Supp. _____, 7 FEP Cases 1010 (1972).

Finally, assuming *arguendo* that petitioners had established statistically a *prima facie* case of discrimination, the court below properly found that the injunctive relief sought would not be warranted on the record before it. As to this question, too, petitioners failed to meet their burden of proof. Thus, the court below correctly noted:

"There has been no consideration or determination here by the district court to establish that at *any* specific previous date *any* truck driving jobs were then available to *anyone*." (Pet. App. 8a, emphasis in original text).⁷

Since petitioners failed to prove their entitlement to relief, the question of whether the seniority of alleged discriminatees should be retroactive to the date of application or the date they thought of applying or would have applied is moot.⁸

⁷Petitioners also failed to establish the existence of irreparable injury. While petitioners asserted economic loss due to the allegedly discriminatory layoffs, such injuries have been held not "irreparable" in the absence of more extraordinary circumstances. *Sampson v. Murray*, 415 U.S. 61 (1974).

⁸For this reason, the Court need not consider the alleged conflict between the decision below and those of other circuits on the issue of retroactive seniority. Furthermore, no such conflict actually exists. The cases cited by petitioners deal with persons actually hired (*Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976)); promotions or transfers (*Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974), cert. granted, ____ U.S. ____, 44 U.S.L.W. 3662 (1976)); or union or apprentice committee discrimination in job referrals, issuances of work permits or admis-

In summary, the court of appeals' finding that petitioners failed to establish a strong likelihood of success on the merits does not warrant review by the Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,
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November 8, 1976.

sion to membership (*EEOC v. Local 638, Sheet Metal Workers*, 532 F.2d 821 (2d Cir. 1976); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971); *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969); *United States v. Wood, Wire and Metal Lathers Local 46*, 471 F.2d 408 (2d Cir. 1973). The issue which petitioners claim was erroneously decided below has not been ruled upon in other circuits and was mere *dicta* in this case.